Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1964.

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS and GEORGE ROSENBLOOM,

Petitioners,

vs.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC.,

Respondents.

Appendix

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RELEVANT DOCKET ENTRIES.

1963

Oct. 14. Complaint filed.

Oct. 14. Summons exit.

Oct. 15. Order denying Temporary Restraining Order and fixing hearing for Preliminary Injunction on Oct. 21, 1963 at 9:30 A. M. in Court Room 2 and affidavits filed.

Oct. 21. Argued sur defendants' motions to dismiss complaint.

Oct. 21. Motion of City of Phila., H. R. Leary and J. C. Crumlish to dismiss filed.

Oct. 22. Transcript of arguments re petition preliminary injunction 10/21/63 filed.

Nov. 20. Opinion (Hon. John W. Lord, Jr.) and Order of Court granting motions to dismiss of defendants, City of Philadelphia, Howard R. Leary and James C. Crumlish, Jr., and dismissing the complaint of plaintiffs, Outdoor American Corporation, G. & L. Distributors and George A. Rosenbloom, filed.

Dec. 3. Plaintiffs' notice of appeal against judgment dismissing complaint as to City of Philadelphia, et al., filed.

Dec. 3. Copy of notice to U. S. Court of Appeals filed.

Dec. 3. Plaintiffs' bond for costs on appeal filed.

Dec. 6. Record transmitted to U. S. Court of Appeals.

COMPLAINT

1. The plaintiff, Outdoor American Corporation, is a corporation duly organized under the laws of the State of Washington, doing business in the City and County of Philadelphia, Pennsylvania, and engaged in the publication of Nudist Publications, which is shipped throughout the United States for distribution.

2. The plaintiff, G. & L. Distributors, is a partnership registered under the Fictitious Names Act in the County of Philadelphia and Commonwealth of Pennsylvania and is engaged in the wholesale sale of magazines and paperback books in the City of Philadelphia, Pennsylvania, and elsewhere.

3. The plaintiff, George A. Rosenbloom, is a resident of the City of Philadelphia, Pennsylvania, and one of the owners and one of the operators of the G. & L. Distributors.

4. The defendant, City of Philadelphia, is a first class city in the County of Philadelphia, Pennsylvania, conducting a municipal government under a "Home Rule Charter".

5. The defendant, Howard R. Leary, is the duly appointed Police Commissioner of the said City of Philadelphia.

6. The defendant, James C. Crumlish, Jr., is the duly elected District Attorney for the said City and County of Philadelphia and holds that statutory office.

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* Not printed in Appendix to Brief

10. This action is brought pursuant to and the jurisdiction of this Court is founded upon, the Federal Statute, 28 U. S. Code, Sec. 1343, which provides, inter alia: "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ."

11. The plaintiff, Outdoor American Corporation, publishes in the State of Washington and elsewhere and causes to be distributed throughout the United States to certain wholesalers the following Nudist Publications:

Eden, Paradise, American Nudist, The Naturist, Sun Fun, Nude World, American Sunbather Magazine, Hellas, Naturist Life, The Nudists and Nudist Primer.

12. The plaintiff, G. & L. Distributors, by one of its owners and operators, George A. Rosenbloom, orders and purchases magazines and paperback books printed and published in many states of the United States, almost entirely outside of the Commonwealth of Pennsylvania. Immediately upon receipt of said magazines and books, plaintiffs herein, distribute the magazines and books, as a wholesaler, to retail outlets throughout the City and County of Philadelphia, Pennsylvania, and elsewhere. The customers of plaintiffs herein, are newsstands, drug stores, candy stores, and other vendors of magazines and books.

13. Beginning in the recent past, continuing in the present, and threatening to continue in the future, the defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., and their subordinates have deliberately embarked upon a campaign to prevent the wholesale sale or retail sale or display of plaintiffs' nudist books and maga-

zines which they have determined are obscene, and are acting under color of the Pennsylvania Statute making sale of obscene literature a felony. Act of 1939, June 24, P. L. 874, Sec. 524, as amended, 18 Purdon's Stats. Ann., Sec. 4524, and under such color is depriving plaintiffs of their constitutional rights, privileges and immunities.

14. Among the magazines for which plaintiff, G. & L. Distributors, is the sole and exclusive local distributor and wholesaler are as enumerated in paragraph 11 of this Complaint. All of said magazines come to plaintiff from a point outside the Commonwealth of Pennsylvania, and constitute a part of the stream of interstate commerce.

15. The defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., have marshalled all resources of their respective offices for the purpose of preventing the sale, distribution, or display of any of the publications referred to in paragraph 11 of this Complaint.

16. Pursuant to the defendants' plan to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 1, 1963, without any search warrant and under color of the statute as hereinbefore mentioned in paragraph 13 of this Complaint, the defendant, City of Philadelphia, through its agents, servants and employees, the defendant, Howard R. Leary, Police Commissioner and his subordinates, did arrest the plaintiff, George A. Rosenbloom, and confiscate and seize the property of the plaintiff, G. & L. Distributors, 18 boxes of books and magazines which included Nudist, Natures Life Hellas, Eden, Naturalist, Sun Fun, American Nudist Leader, and Paradise. Following this, the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates, commenced criminal prosecution.

17. Pursuant to the defendants' plan, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 4, 1963, police officers, acting pursuant to the direction and under the authority of the defendants, City of Philadelphia and Howard R. Leary, Police Commissioner, entered the premises of plaintiffs, George A. Rosenbloom and G. & L. Distributors, and pursuant to an illegal warrant for search and seizure, seized the following for purpose of illegal confiscation: 17 cartons containing 1700 Eden Magazines, 288 Naturalist Life, 8 Nude World, 13 Paradise, 1 Sunbather, 1 Naturist, 1 Eden, 1 Sunshine Health, 157 Hellas Vol. 2 #10, 287 Hellas Vol. 1 #5, 5 Hellas Vol. 2 #9. Following this, the plaintiff George A. Rosenbloom was arrested and the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates commenced criminal prosecution.

18. The foregoing arrest and seizure was illegal and without authority of law.

* * * * * * * *

26. The above said arrest was made at the instance of the defendants, City of Philadelphia, Howard R. Leary, through their agents, servants and employees, maliciously and without reasonable and probable cause.

27. The plaintiff, George A. Rosenbloom, avers that he has been put to great expense by the employment of counsel to represent him in connection with the unjust charges brought by the said defendant, City of Philadelphia, through their agents, servants and employees against him, and he

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* Not printed in Appendix to Brief.

has been caused great humiliation, pain and suffering incident to his arrest; he avers further that his reputation and good character have been damaged by reason thereof, and he has suffered great financial damage by reason of the loss of his consumers caused by the said arrest.

28. The plaintiff, George A. Rosenbloom, further avers that by reason of the wilful and malicious acts of the defendants as aforementioned, he, George A. Rosenbloom, is entitled to punitive damages, in addition to compensatory damages, both of which he hereby claims of the defendants, as aforementioned.

29. Despite numerous requests by plaintiffs of defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., the defendants have failed and refused to return any of said seized books and magazines, defendants herein contending that they have legally confiscated all of said material, thereby depriving plaintiffs of an opportunity to sell said magazines and books for profit, or to return to the national distributor, said books or magazines for credit.

30. The police officers, acting under the direction and authority of the Police Commissioner, possessed a document entitled "Warrant for Search and Seizure" which was invalid and illegal, in that it declared only that the said police officers might search for "obscene materials" which, under the Constitution of the United States, is insufficient authority for search and seizure.

31. As a result of the actions of the defendants, nearly all retail outlets in Philadelphia County have returned all the magazines and paperback books listed in paragraph 11 to plaintiffs and other magazines of a similar or like nature, thereby causing grave and irreparable harm to plaintiffs.

32. Defendants have adopted a criterion of obscenity which declares that nudity is obscenity. In addition, defendants have adopted and are enforcing a criterion that bare breasts or bare buttocks constitutes obscenity when appearing in a magazine or book.

33. Defendants, Police Commissioner and District Attorney, have illegally set themselves up as censors of magazines and books which may be distributed in Philadelphia County.

34. The actions of the defendants have caused, and unless restrained will continue to cause, plaintiffs irreparable harm, damage and injury.

35. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., constitute a prior restraint on communication, set up a censorship of magazines and books, and render herein defendants as censors of magazines and books for the County of Philadelphia, all in violation of the rights of the plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

36. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of press of plaintiffs and constitute a denial of the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

37. The actions of the defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprive plaintiffs of valuable property rights without due process of law, in violation of the Fourteenth Amendment to the Constitu-

tion of the United States, in that plaintiffs are prevented from continuing to engaged in the lawful business of the wholesale sale and distribution of magazines and books in Philadelphia County.

38. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., are arbitrary, unreasonable, and in excess of duly constituted legal authority and without any basis in law.

39. Plaintiffs believe and aver that defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., have exceeded their lawful powers and by their arbitrary action, have caused irreparable injury to plaintiffs' rights, whereby plaintiffs are entitled to apply to equity for an injunction against defendants, enjoining defendants from continuation of the prior practices, procedures and conduct.

WHEREFORE, plaintiffs ask judgment and relief of this Court as follows:

(a) Declaring that none of the various issues of the magazines and books as enumerated in paragraph 11 of this Complaint constitutes hard-core pornography, or is obscene, or is subject to governmental suppression, in accordance with the definition of obscenity as established by the United States Supreme Court, in the case of *Roth v. United States*, 554 U. S. 476 (1957), consistent with the guarantees of the Federal Constitution.

(b) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., their employees, subordinates and agents, and all persons acting for or in their behalf and in concert with them to restrain from directly or indirectly threatening the

plaintiffs, their agents, employees, customers or prospective customers and other outlets for magazines and periodicals sold by the hereinmentioned plaintiffs with the institution of any suit, criminal or civil, arrest or seizure of merchandise, or instituting a multiplicity of suits against the herein mentioned plaintiffs, their vendees or successors, based upon the sale, purchase, display or possession of any nudist magazines or publications as enumerated in paragraph 11 of this Complaint.

(c) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to return to the plaintiffs the said magazines and books which they have confiscated from the plaintiffs as alleged in paragraph 16 and 17 of this Complaint.

(d) In issuing an Injunction preliminarily, and then permanently, enjoining the defendants from continuing the acts, conduct and charges hereinbefore complained of.

* * * * * * * *

(f) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of press of plaintiffs, contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

(g) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprived the plaintiffs of valuable property rights, without due process of law.

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(h) Entering a judgment against the defendants in favor of the plaintiffs for damages sustained, which damages plaintiffs aver will aggregate in excess of One Million ($1,000,000.00) Dollars.

(i) For such other and further relief as may be deemed appropriate by this Honorable Court to your plaintiffs may in justice and equity and right be entitled.

And plaintiffs will ever pray, etc.

BENJAMIN PAUL,
Attorney for Plaintiffs.

DEFENDANTS' MOTION TO DISMISS.

Defendants City of Philadelphia, Howard R. Leary, and James C. Crumlish, Jr., move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against defendants City of Philadelphia, Howard R. Leary, and James C. Crumlish, Jr., upon which relief can be granted.

2. To dismiss the action against defendant City of Philadelphia because the City of Philadelphia, as a municipality, is not "a person" within the meaning of Title 42 U. S. C. A. 1981, et seq., so as to give the plaintiffs a right of action.

3. To dismiss the action against defendant City of Philadelphia because the Court lacks jurisdiction to entertain

a civil claim against the City of Philadelphia under Title 42 U. S. C. A. 1981, et seq.

THEODORE H. LUNINE,
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JOSEPH V. FURLONG, JR.,
Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Attorneys for Defendants, City of Philadelphia, Howard R. Leary, and James C. Crumlish, Jr.

OPINION AND ORDER

JOHN W. LORD, JR., J. November 20, 1963.

Plaintiffs' Complaint in Equity filed October 14, 1963, and amended October 22, 1963, named six defendants. By order of this Court filed November 20, 1963, the three defendants last named in the original caption of this case (hereinafter called News Media defendants) have been dismissed for reasons not necessary to notice in this Opinion but set out in the Order. The remaining defendants are the City of Philadelphia and two of its officials, Howard R. Leary, Police Commissioner and James C. Crumlish, Jr., District Attorney. This opinion will deal solely with the questions of law raised by them.

The respective plaintiffs are publishers and distributors of nudist literature. Outdoor American Corporation, organized under the laws of the State of Washington, publishes nudist magazines and paperback books and ships them throughout the United States. The second named

plaintiff, G. & L. Distributors (hereinafter called G. & L.), is a partnership engaged in the wholesale distribution and sale of magazines and paperback books in the City of Philadelphia and elsewhere. The third and last-named plaintiff is one of the owners and operators of G. & L., George A. Rosenbloom.

Defendants Leary and Crumlish are citizens and residents of the Commonwealth of Pennsylvania, and the City of Philadelphia is a municipal corporation of Pennsylvania.

Outdoor American is a Washington corporation which does not have its principal place of business in Pennsylvania. G. & L. is a partnership registered under the Fictitious Names Act in the County of Philadelphia and Commonwealth of Pennsylvania. George A. Rosenbloom is a resident of the City of Philadelphia, Commonwealth of Pennsylvania.

Thus, all parties except Outdoor American Corporation are citizens of the Commonwealth of Pennsylvania. By Amendment filed October 22, 1963, plaintiffs asserted jurisdiction on the grounds of diversity of citizenship and amount. It is, however, patent that there is no diversity under 28 U. S. C. A. §1332(a)(1), since all defendants are citizens of the same state as some of the plaintiffs. *Rader v. Manufacturers Cas. Ins. Co. of Philadelphia*, 242 F. 2d 419 (2nd Cir. 1957); *Russell v. Basila Mfg. Co.*, 246 F. 2d 432 (5th Cir. 1957).

From the briefs and arguments of law of plaintiffs it is seen that the diversity of citizenship was alleged as grounds for jurisdiction only as to the three News Media defendants who have heretofore been dismissed. As the case now stands, it is clear that if jurisdiction of this Court is to be maintained, it must stand on grounds other than diversity. The original complaint based jurisdiction on the so-called Civil Rights statute, 28 U. S. C. A. §1343, and set out the following provisions thereof:

> ". . . district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States . . ."

Plaintiffs list nine periodicals and two paperback books which Outdoor American prints and ships to the distributor plaintiffs among others: *Eden*, *Paradise* and so on. Since the merits will not be reached herein, it is unnecessary to name or discuss the material in question.

Plaintiffs aver the following facts:

That early in October, 1963, plaintiff Rosenbloom was arrested in Philadelphia by the Philadelphia police for violation of the Pennsylvania statute which makes dealing in obscene publications a felony. Plaintiffs allege that under color of the Act in question; defendants are depriving them of their constitutional rights, privileges and immunities. Act of 1939, June 24, P. L. 874 §524 as amended, 18 Purd. Stat. Ann. §4524.

Plaintiffs allege that this arrest and deprivation is part of a deliberate campaign by defendants to prevent the wholesale or retail sale or display of plaintiffs' nudist books, which they have determined are obscene.

Other acts of deprivation by defendants are recited in addition to the arrest of plaintiff Rosenbloom in that they: seized 18 boxes of books and magazines, property of G. & L., containing approximately 2500 copies of the nine publications in question; started a criminal prosecution of Rosenbloom under the cited statute; failed to return the seized material on request; adopted a criterion of obscenity which declares that nudity is obscenity; defendants Leary and Crumlish have set themselves up as censors of books and magazines which may be distributed in Philadelphia County

in violation of the rights of plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States; in particular have denied plaintiffs their constitutional rights of freedom of speech and freedom of expression; have prevented plaintiffs from continuing to engage in their lawful business in Philadelphia County, thus depriving them of valuable property rights without due process of law in violation of the Fourteenth Amendment; and that the actions of the defendants are arbitrary, unreasonable, in excess of duly constituted legal authority, and without any basis in law. In addition it is repeatedly alleged that the described arrest, search and seizure was illegal in various respects. Finally, in the lengthy complaint there are various other allegations, obviously of a conclusory nature, not necessary to notice here.

The relief sought includes the following requests: a declaration that none of the "various issues" of the plaintiffs' eleven listed publications constitutes hard-core pornography, or is obscene, or is subject to governmental suppression, in accordance with the definition of obscenity stated in *Roth v. United States*, 354 U. S. 476 (1957); a preliminary injunction (thereafter to be made permanent), on grounds of threatened irreparable injury, against the "continuation of the prior practices, procedures and conduct" of these defendants; restraining defendants from threatening the plaintiffs or their customers with arrest, search, seizure or prosecution of the plaintiffs' eleven periodicals, or starting suits against them in connection with dealings with these publications; directing defendants to return the seized periodicals; declaring the defendants' actions violative of the plaintiffs' constitutional rights of property, freedom of speech, and freedom of the press; and also asks judgment for damages sustained in the amount of one million dollars.

Plaintiffs' request is not a modest one. It asks this Court to exercise its power to the very limit of its scope and func-

tion, if not considerably beyond. Argument has been heard on the Motions to dismiss of the several defendants; memoranda of law have been received from all parties; have been duly considered; and the Court is prepared to grant defendants' motions to dismiss for the following reasons.

Insofar as the plaintiffs seek by indirection to enjoin criminal prosecutions in the Commonwealth of Pennsylvania, they ask the Court to assume a task which has been undertaken only in the gravest emergencies. *Stefanelli v. Minard*, 342 U. S. 117, 120 (1951).

The case last cited involved an interpretation of the very statute which is invoked as ground for jurisdiction in the instant case, the so called Civil Rights statute derived from the Act of April 20, 1871. 28 U. S. C. A. §1343. It was there decided that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful seizure. *Stefanelli v. Minard*, 342 U. S. 117, 120 (1951).

The circumstances under which that statute was enacted, and the evils it was designed to remedy, were given even more detailed attention by the United States Supreme Court in 1961. *Monroe v. Pate*, 365 U. S. 167, 171-188. It was pointed out that the statute was made necessary by the activities of the Ku Klux Klan. It was designed to provide a remedy to parties deprived of rights by an official's abuse of his position, but it was not intended to apply to municipal corporations. There, the Supreme Court of the United States held that the tort claims brought by a negro family who were subjected to a violent invasion of their rights by Chicago police officers did not state a cause of action against the City of Chicago, but only against the named police officers. *Monroe v. Pate*, 365 U. S. 167 (1961).

More recently, however, a charitable organization secured prospective relief against a city ordinance which arbitrarily restricted community and charity campaigns. *Adams v.*

City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961). Jurisdiction was based on the same statute, 28 U. S. C. A. §1343, but the Court of Appeals distinguished *Monroe v. Pate*, supra, on the ground that the case before it dealt with an unconstitutional legislative enactment of the municipal corporation rather than a tort. *Adams v. City of Park Ridge*, 293 F. 2d 585, 587 (7th Cir. 1961).

It is believed that the Seventh Circuit decision last cited has no bearing on the applicability to the present case of *Monroe v. Pate*, since plaintiffs have made no claim that the Pennsylvania Obscenity Statute is unconstitutional.

Perspective is gained by reference to the succinct explanation of Judge Maris in *Williams v. Yellow Cab Co.*, 200 F. 2d 302, 307 (3rd Cir. 1952); *cert. den.* 346 U. S. 840, *sub nom. Dargan v. Yellow Cab Co.* (1953):

> ". . . jurisdiction is claimed [under] Section 1343 of Title 28, United States Code, commonly known as the Civil Rights Act . . . The Civil Rights Act was originally enacted to enforce the Fourteenth Amendment. It has long been settled that the Fourteenth Amendment is directed only to state action and that the invasion by individuals of the rights of other individuals is not within its purview. It necessarily follows that the jurisdiction conferred upon the federal district courts by Section 1343 is similarly limited and that *redress for the invasion by an individual of the civil rights of another must be sought in the state courts*, unless, of course, diversity of citizenship is present." (Emphasis added.)

That language has been frequently cited, and the principle has been invoked in many cases since 1952, e.g., *Davis v. Foreman*, 251 F. 2d 421, 422 (7th Cir. 1958).

From the foregoing it seems clear that if plaintiffs are to maintain their action, it must be against the two named

public officials, Leary and Crumlish, for abuse of their official positions, and not against the defendant municipality.

Plaintiffs have cited a great many cases decided by the United States Supreme Court and other federal courts having to do with obscenity. Only a few will be mentioned.

In *Roth v. United States*, 354 U. S. 476 (1957), two statutes, federal and Californian respectively, were involved. Roth had been convicted for a violation of the federal obscenity statute, and Alberts had likewise been convicted under the California statute. Both statutes and convictions were challenged. In both cases, the statutes were held not unconstitutional, and the convictions were affirmed since the lower courts had applied proper standards of interpretation of those statutes. It is to be noted that the Roth case was a federal statutory case, and the Alberts case involved an attack on a state conviction under a state statute. In neither case was prospective relief sought.

The other cases involved nudist magazines. One of the latest is *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767 (D. C. 1960). Its specific conclusion was that two particular nudist publications, *Sunshine and Health*, and *Sun Magazine* (neither of which are presently involved) were entitled to second class mailing privileges.

In the case last cited, a long footnote details the prior litigation. *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767, 768 n. 1 (D. C. 1960). In the course of the opinion it was noticed that there was a tacit holding that certain issues of the two periodicals were not obscene in *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958). Notice was also taken of the reading given that case in *Poss v. Christenberry*, 179 F. Supp. 411 (S. D. N. Y. 1959), where Judge Frederick van Pelt Bryan wrote:

> ". . . It is plain that the Supreme Court in the Sunshine Book case did not give blanket approval to all

material containing nude photographs. It held only that the magazine there under consideration, published by a bona fide group devoted to the cult of nudism, and containing pictures of nudists in the nude, was not obscene. There was no question of the sincerity of purpose of the publishers and the objective of the photographs and text was not an appeal to prurient interest." *Poss v. Christenberry*, 179 F. Supp. 411, 416 (S. D. N. Y. 1959).

Since the objection of obscenity had been withdrawn by the defendant Postmaster General in the District of Columbia case, and it involved periodicals not here in question, and entirely different statutes, it is not possible to say that the Sunshine cases are in any sense controlling in the present matter. *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767 (D. C. 1960) and cases cited therein.

To follow the long battle of certain other nudist publications in the courts is, for that matter, entirely beyond the scope of the problem at hand. The present problem is governed by a much different line of authority.

In *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (1962), the United States District Court for the District of New Jersey was asked to restrain New Jersey Law Enforcement authorities from proceeding under the New Jersey obscenity statute against the book "Tropic of Cancer" and the sellers thereof. The three-judge District Court dismissed the bill of complaint, finding that there was no showing of a danger of irreparable injury both great and immediate and there was no showing that the New Jersey courts would deal with the matter other than fairly, wisely and expeditiously. *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580, 583-4 (D. N. J. 1962).

Also in point, and very close to the present case on certain of the facts is *Toth v. Silbert*, 184 F. Supp. 163 (N. D.

Ohio 1960). In that case there was pending against plaintiff an indictment in the Ohio courts for possession and exhibition of magazines and books, alleged to be obscene. Plaintiff sought to enjoin prosecution, asserting violation of his constitutional rights on many of the grounds argued by the plaintiffs in the present case. On the authority of *Douglas v. City of Jeannette*, 319 U. S. 157 (1943), the three-judge court declined to intervene in the absence of a showing of the irreparable injury, clear and imminent, which alone justifies interference in state proceedings. *Toth v. Silbert*, 184 F. Supp. 163, 168 (N. D. Ohio 1960, authorities collected at page 169). If a federal court of equity will not interfere to prevent State authorities from using evidence obtained in an unlawful search in a pending criminal prosecution, *Stefanelli v. Minard*, 342 U. S. 117 (1951), all the more will it not enter into a state case once begun, because it is "perhaps the most sensitive source of friction between States and Nation". *Ibid.*, 184 F. Supp. 163, 169.

As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of that statute.

For all the foregoing reasons, it is the ruling of this Court that the Motions to Dismiss of Defendants, CITY OF PHILADELPHIA, HOWARD R. LEARY and JAMES C. CRUMLISH, JR., are hereby GRANTED and the Complaint of Plaintiffs, OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS, and GEORGE A. ROSENBLOOM will accordingly be DISMISSED, and it is SO ORDERED.

/s/ JOHN W. LORD, JR.,

J.

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME.

(Received and Filed February 10, 1964.)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The motion of the City of Philadelphia respectfully represents:

1. That the City of Philadelphia, its District Attorney and its Chief of Police are appellees in the above appeal. Appellants have appealed from an order of the District Court for the Eastern District of Pennsylvania granting appellees' motion to dismiss appellants' Complaint. Said Complaint sought to enjoin the appellees from interfering with the display and sale of so-called "nudist" publications.

2. Appellants' brief herein was filed on December 30, 1963.

3. Because of the press of litigation in the Law Department of the City of Philadelphia, the appellees' brief has just been able to be completed and is being delivered to the printer this date.

WHEREFORE, the appellees move your Honorable Court to permit them to field their brief in the above entitled matter out of time.

MATTHEW W. BULLOCK, JR.,
Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Attorneys for the Appellees.

OPINION OF THE COURT.

(Filed June 30, 1964.)

By LEAHY, District Judge.

Plaintiffs are publishers and distributors of nudist magazines and paperback books. In October, 1963, defendants confiscated a large quantity of plaintiffs' publications and arrested and are prosecuting plaintiff Rosenbloom in the Pennsylvania criminal court for violation of the Pennsylvania statute which makes dealing in obscene publications a felony.[1] Suit was brought by plaintiffs in the United States District Court for the Eastern District of Pennsylsylvania for a declaratory judgment and injunctive relief under the Civil Rights Act.[2] Upon defendants' motion, the district court dismissed the complaint on the grounds there was no showing of irreparable injury, clear and imminent, so as to justify interference in state proceedings and the City of Philadelphia is not a proper party under the Civil Rights Act. Though the entire complaint was dismissed, plaintiffs appeal only from dismissal of their cause against City of Philadelphia, Police Commissioner Howard R. Leary, and District Attorney James C. Crumlish, Jr.

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[1] Act of 1939, June 24, P. L. 874, §524, as amended. 18 Purd. Stat. §4524.

[2] 28 U. S. C. §1343 provides in material part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * * * * * *

"(3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ."

Plaintiffs allege defendants are depriving them of their constitutional rights, privileges and immunities under color of the Pennsylvania Statute. Also, the arrests and deprivation is part of a deliberate campaign by defendants to prevent wholesale or retail sale or display of plaintiffs' publications which they, acting as censors, have determined are obscene. Further, plaintiffs allege defendants have adopted a criterion that nudity is obscenity; valuable property has been taken without due process of law; freedom of speech and freedom of expression have been denied them; the arrests are illegal; and the actions of defendants are without any basis in law.

Relief sought includes a declaration none of the publications in question constitutes hard-core pornography, or is obscene, or is subject to governmental suppression in accordance with the definition of obscenity stated in Roth v. United States, 354 U. S. 476 (1957); a preliminary injunction (thereafter to be made permanent) against continuation of prior practices, procedures and conduct of defendants; restraining defendants from threatening plaintiffs or their customers with arrest, search, seizure or prosecution of their publications; directing defendants to return seized publications; and declaring defendants' actions violative of plaintiffs' constitutional rights of property, freedom of speech, and freedom of press.

Decisive of this appeal is the question whether the district court in the exercise of its discretion was correct in refusing to use its equitable power. Plaintiffs concede federal courts will not interfere with a state's criminal prosecution. However, they contend a reading of their complaint demonstrates only one prayer for relief among several concerned suppression of evidence. Thus, plaintiffs argue, the fact they may not be entitled to all relief sought does not warrant dismissal of the entire action. We disagree with plaintiffs' basic contention only one request re-

quires interference with state proceedings. All, at least by indirection, do.

Plaintiffs prayer for a declaration the publications in question are not obscene is a circuitous way of requesting the district court "to interfere with or embarrass" state proceedings. Whether the court should abstain from passing upon the merits of this litigation, leaving that decision to the state courts, is the crucial question raised by the request for a declaratory judgment. No reason for the district court to involve itself with the basic question of obscenity at this time exists. The decision of the state courts may result in plaintiffs' obtaining the objectives they now seek. If not, petition to the Supreme Court of the United States for writ of certiorari remains. As Mr. Chief Justice Stone for the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 163 (1943), stated:

> "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds."

Danger of irreparable injury both "clear and imminent" has not been shown. Since there are three plaintiffs in the

matter before the federal court and only one involved in state proceedings, it is argued a finding of not guilty in the state courts of one of plaintiffs is no protection to the others. The fact only one plaintiff is being prosecuted in the state courts is without independent legal significance, since publications involved are the same as to each plaintiff. All issues plaintiffs are raising in the federal court may be brought before the state courts, and there is no reason to believe state officials will enforce the Pennsylvania statute against plaintiffs not involved in state proceedings if the publications are found not obscene in the pending criminal prosecution. If held obscene, plaintiffs not involved in state proceedings cannot complain of enforcement of the statutes. Nor should a federal court of equity ambush the state courts by deciding the fundamental basis of obscenity.

Paragraph (c) under the prayer for relief, which requests return of seized publications, makes no mention of time. Therefore, plaintiffs argue, if time for their return was fixed by the court as after state proceedings, there could be no interference with the State. But there is no suggestion, and we cannot assume the materials will not be returned to the proper people if found not obscene. If held obscene, plaintiffs cannot complain of confiscation.

So far as the preliminary injunction is concerned, plaintiffs contend it is directed at future unconstitutional acts and is supported by Refoule v. Ellis, D. C. Ga., 74 F. Supp. 336, 343, wherein the following is stated:

> "This does not violate the general principle that equity does not ordinarily interfere with the administration of criminal law . . Plaintiff seeks to enjoin not the administration of criminal laws by the State of

> Georgia, but the illegal manner of administration by defendants as agencies of the State."

As in *Refoule*, plaintiffs argue they seek to enjoin not state proceedings, but unlawful harassment by local officials. Harassment will continue regardless of outcome of pending criminal proceedings, according to plaintiffs, unless injunctive relief is granted.

As a result of unlawful arrest, detention and interrogation by the Georgia police, plaintiff in *Refoule* sought an injunction and damages. In an apparent attempt to establish a case of sodomy against plaintiff, the police on four occasions arrested him, held him incommunicado, and subjected him to questioning for long hours under unusual circumstances and in unusual places. Defendants "failed to express any intention to cease the commission of such acts in the future, but on the other hand, have strongly insisted that they were within their rights in doing what they have done and in continuing to do so in the future if they find it desirable to do so." Thus, Georgia police not only committed flagrant violations of plaintiff's civil rights, but in addition threatened to continue to do so. No such situation exists here. No doubt defendants intend to enforce the Pennsylvania statute against plaintiffs' publications until final adjudication of their obscenity. However plaintiffs are not warranted in assuming state officials would misuse their power or refuse to acquiesce in a decision of the state courts favorable to plaintiffs. Continued criminal prosecution regardless of outcome of pending state proceedings is an unwarranted assumption not sufficient to establish irreparable injury. While plaintiffs may be sustaining some inconvenience and loss "[I]t does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding

brought lawfully and in good faith . . .'" *Jeannette, supra*, 164.

Cases cited by plaintiffs as authority for granting injunctive relief are inapposite, since they do not involve collateral proceedings in state courts. In the instant action, usual criminal procedures with their constitutional safeguards were invoked, and there is no reason to believe defendants will not be respectful of the Federal Constitution and laws. As observed by the district court:

> "As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of that statute."

Whether City of Philadelphia is a proper party under the Civil Rights Act need not be resolved, since we find no ground for supposing intervention of a federal court in order to secure plaintiffs' constitutional rights will be either necessary or appropriate.

The order of the district court dismissing plaintiffs' complaint will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[a] Cf. Grove Press, Inc. v. Calissi, D. C. N. J., 208 F. Supp. 580, and Toth v. Gilbert, N. D. Ohio, 184 F. Supp. 163. In both cases complainants as businessmen suffered the same kind of inconvenience and possible financial loss plaintiffs herein are alleged to be suffering. In both cases, as in the present case, there is no suggestion the Federal Constitution and laws will not be respected by the state court.

JUDGMENT

(Received and Filed June 30, 1964.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed November 20, 1963, dismissing plaintiffs' complaint be, and the same hereby is affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

June 30, 1964.

PETITION FOR REHEARING

(Received and Filed July 9, 1964.)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The above captioned Petitioners, by their attorney Benjamin Paul, respectfully represents:

1. That on October 1, 1963 and again on October 4, 1963, Petitioners' books and magazines of the nudist type were confiscated by the police of the City of Philadelphia and the petitioner George A. Rosenbloom arrested under color of the Pennsylvania Statute making sale of obscene litera-

ture a felony (Act of 1939, June 24, P. L. 874, Sec. 524, as amended; 18 Purdon's Stats. Ann., Sec. 4524).

2. On each occasion, immediately thereafter, the petitioner George A. Rosenbloom was admitted to bail, the District Attorney commenced his prosecution, and the books and magazines of the Petitioners confiscated and their further distribution prevented by these governmental authorities without any prior judicial determination as to their obscenity or violation of the law, all in violation, procedurally, of the law as propounded by the United States Supreme Court in *Marcus v. Search Warrants*, 367 U. S. 717, 8 S. Ct. 1708 (1961).

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in *Kingsley Books*[1] might have had to circulate the publications despite the interim restraint and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be

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[1] **Kingsley Books, Inc. v. Brown**, 354 U. S. 436.

seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him" (Marcus v. Search Warrants, supra).

3. That on October 14, 1963, Petitioners filed a civil complaint with the United States District Court for the Eastern District of Pennsylvania alleging that their constitutional rights to freedom of Press, Speech and Due Process were being violated by the State authorities and by authority of the "Civil Rights Act" (28 U. S. C., Sec. 1343), a declaratory judgment, injunction relief, temporary and then permanent, and damages was sought.

4. That on October 15, 1963, a Temporary Restraining Order was refused by the lower Court.

5. That on November 20, 1963, Petitioners' entire complaint was dismissed by the lower Court on the grounds that Petitioners sought by indirection to enjoin criminal prosecutions in the Commonwealth of Pennsylvania undertaken only in the gravest emergencies.

6. That during all this time Petitioners' books and magazines were still confiscated and held by the state authorities after local proceedings were initiated by the Petitioners to have them returned, with no avail and no remedy but to wait for the conclusion of the State's criminal proceedings.

7. On or about May 11, 1964, some seven months after the original arrest and confiscation the Petitioner George A. Rosenbloom was found not guilty of the alleged obscenity charges and the books and magazines with some difficulty were returned; there still being a large number held by the state authorities in conjunction with other defendants under arrest.

8. That on June 30, 1964, after an appeal had been taken to this Court from the judgment of the lower Court on December 3, 1963, this Court entered an order affirming the order of the lower Court on the grounds that danger of irreparable injury both "clear and imminent" has not been shown and that while petitioners may be sustaining some inconvenience and loss it does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith.

9. That this Court's decision was erroneous in that it leaves the Petitioners as well as any other citizen without any immediate and direct remedy for a violation of his civil and constitutional rights when State authorities by means of a criminal prosecution prevent the free expression of speech and press for a period as in this case for over seven months and more and is still continuing.

10. Petitioners have always maintained that the manner in which the State authorities confiscated their books and magazines were illegal and that a prior determination before any arrest or confiscation, in keeping with the "*Marcus*" decision and the protection of constitutional guarantees would have been the proper course. This, so that until proven, a citizen's liberty could not be suspended and made the victim of the law's long delay. This, also, in

much the same manner as a citizen is admitted to bail when he is accused, so that his liberty until otherwise determined is safeguarded. Speech and Press as any other liberty should have some form of bail. Here a temporary injunction is the answer. The question of obscenity is not as important as the method used to determine it. There is no authority in the land that would not come to the aid of a man held in custody without due process of law. It is the Petitioners' prayer that a citizen's expressions and ideas should be given that same aid by the federal courts when the State authorities take that direction. Petitioners most ardently and sincerely believe that to deny a citizen free expression for even one moment as well as seven months and more is not slight or inconsequential and is irreparable. It is of the nature where the Federal authorities by virtue of the "Civil Rights" law must direct the states.

WHEREFORE, your Petitioners respectfully request that this matter be circulated to all the Judges of the United States Court of Appeals for the Third Circuit for their deliberation and for such action as is properly indicated upon consideration of the facts set forth hereinabove. Your Petitioners further respectfully request that if this Petition is denied, the Court indicate the ground upon which such denial is based.

Respectfully submitted,

BENJAMIN PAUL,
1405 Locust Street,
Philadelphia 2, Pa.

CERTIFICATION.

This is to certify that this Petition is presented in good faith and not for delay.

BENJAMIN PAUL,
Attorney for Petitioners.

ANSWER TO PETITION FOR REHEARING.

(Seal) CITY OF PHILADELPHIA

Law Department
703 City Hall Annex
Philadelphia, Pa. 19107
Edward G. Bauer, Jr.
City Solicitor

July 14, 1964

Mrs. Ida O. Creskoff
Clerk, United States Court of Appeals
Federal Court Building
9th and Market Streets
Philadelphia, Pennsylvania

Re: Outdoor American Corp., et al
v.
City of Philadelphia, et al.—No. 14,697

Dear Mrs. Creskoff:

Pursuant to my telephone conversation with you I am submitting this letter in lieu of a formal answer to the Petition for Rehearing in the above case.

The City of Philadelphia opposes the Petition for Rehearing on the ground that the matter was fully considered by both the United States District Court and the United States Court of Appeals and decisions rendered in conformity with the law.

Moreover, as noted in the Petition for Rehearing, the petitioner was acquitted in the Philadelphia Court of Quarter Sessions of the charge of obscenity, a fact which confirms the fact that petitioner's rights are being protected by the state courts. Indeed, the acquittal was in the form of a directed verdict of not guilty. Since this disposition of the criminal prosecution against the petitioner, the undersigned has noted that nudist publications have again appeared on downtown newsstands in Philadelphia.

Since no legal or practical reason for a rehearing appears, we would urge that the Petition for Rehearing be denied.

Yours very truly,

M. W. BULLOCK, JR.,
Matthew W. Bullock, Jr.
Deputy City Solicitor

MWB, JR: jw

SUR PETITION FOR REHEARING.

(Received and Filed July 21, 1964.)

Present: BIGGS, Chief Judge, McLAUGHLIN, KALODNER, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, Circuit Judges, and LEAHY, District Judge.

The petition for hearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN,
Judge.

Dated: July 21, 1964.

ORDER.

(Received and Filed July 28, 1964.)

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until August 25, 1964.

/s/ McLAUGHLIN,
Circuit Judge.

July 28, 1964.

CERTIFICATION.

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendix for Appellants and proceedings in this Court in the case of OUTDOOR AMERICAN CORPORATION and G. & L. DISTRIBUTORS and GEORGE A. ROSENBLOOM, Appellants, vs. CITY OF PHILADELPHIA and HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC. and COLUMBIA BROADCASTING SYSTEMS, INC., No. 14,697, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of July, 1964.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals,
Third Circuit.

(Seal)